No. _____

In the
Supreme Court of the United States

XAVIER GREEN, aka XG,
Petitioner,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT,
aka San Diego City Schools, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 14, 2007

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QUESTION PRESENTED

Do California school districts enjoy immunity from suit under the Eleventh Amendment to the United States Constitution (Eleventh Amendment) as local educational agencies, or is immunity denied under the Eleventh Amendment for the same reasons immunity is not available to other states in the Ninth Circuit, including Nevada, Arizona and Alaska.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant and Petitioner: Xavier Green, formerly identified as X.G., a minor, by J.W., his guardian ad litem.

Defendants-Appellees and Respondents: San Diego Unified School District, also known as San Diego City Schools; Janice Davis Winston; Richard Thibodeau; Jeanine Cunningham; Beth Richer; and Leonore Smith.

CORPORATE DISCLOSURE STATEMENT

The San Diego Unified School District, also known as San Diego City Schools, is a local public entity of the State of California.

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PETITION FOR A WRIT OF CERTIORARI

Xavier Green (Xavier) respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, dated March 16, 2007, is a slip opinion, not published but unofficially reported at 2007 WL 786788 (9th Cir. (Cal.)), and is reproduced at App. A., 1a-3a.

The Order of dismissal issued by the United States District Court for the Southern District of California, filed January 4, 2005, is not reported, and is reproduced at App. C, 6a-16a.

The Order on summary judgment or adjudication issued by the United States District Court, dated June 22, 2004, is not reported, and is reproduced at App. D, 17a-55a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit sought to be reviewed was entered on March 16, 2007, and is reproduced at App. B, 4a-5a. This petition is timely under 28 U.S.C. §2102(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §1254(l).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment XI
Suits Against States

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

This action arises from a vicious attack on March 7, 2001, against Xavier, a permanently disabled black boy, by his peers, on school grounds, when he was a 15 year old 9th grade student attending school within the jurisdiction and under the care, custody and control of defendants, San Diego Unified School District (San Diego Unified), and the individual defendants. App.7a-8a, 18a, 21a.

Xavier's use of his left arm is severely limited in that he is unable to lift the arm due to permanent nerve damage known as Erb's Palsy. App. 18a. His peers harassed Xavier about his disability by persistently addressing him as "faggot" and "bitch." App.19a. Because Xavier liked to ride a skateboard, his peers continuously referred to him as "white boy" which to him was a negative connotation. App. 19a.

The attack on Xavier by his peers occurred after Xavier complained, in 1997 and again from November 2000 through March 7, 2001, to his school counselors (defendants, Winston and Thibodeau), and to the school nurses (defendants, Cunningham and Richer), about his fears and suicidal ideations, arising out of the peer harassment and discriminatory conduct. App. 19a-21a. The peer harassment

was directed to both Xavier's disability because his disability caused his left arm to hang limp, resulting in the peers calling him "faggot" (App. 39a), and to his race as an African American in a form of reverse discrimination when his peers continually identified him as "white boy" because he liked to ride a skate board. App. 19a.

The March 7, 2001 attack was followed by a second attack the next day resulting in Xavier's expulsion from school by the vice principal, defendant, Smith. App. 21a-22a. On August 28, 2001, the San Diego Unified determined the expulsion should not have proceeded and Xavier returned to school. App. 22a.

In the year prior to the attacks on Xavier, there were twenty-one acts of violence and peer harassment of other students on campus. App. 41a. This ongoing pattern of violence created a hostile educational environment for Xavier. App. 41a.

Xavier timely filed his first amended complaint in the United States District Court, Southern District of California, on August 13, 2002, for personal injuries against the school district, the nurses, counselors and vice principal, alleging causes of action under 42 U.S.C. §§1983, 1985, for deprivation of equal protection under the Fourteenth Amendment of the United States Constitution (Fourteenth Amendment), violation of Title II of the Americans with Disabilities Act (ADA) (42 U.S.C. §12123), common law and state law claims. App. 8a, 23a.

Federal jurisdiction was invoked in the United States District Court by original jurisdiction under 28 U.S.C. §§ 1331, 1343 and supplemental jurisdiction under 28 U.S.C. § 1367 to determine the state law claims.

On June 22, 2004, the district court entered an order denying defendants' motion for summary judgment as to Xavier's Fourteenth Amendment claims against defendants, Winston, Thibodeau and Cunningham in their personal capacities on the basis that Xavier has raised a genuine issue of material fact as to whether the individual defendants' actions or failures to act were because of Xavier's disabilities. App. 8a, 38a-39a. The order further denied summary judgment on the common law claim for negligence. App. 8a, 50a. Xavier's ADA claim was dismissed as to all defendants on the basis that plaintiff had not shown deliberate indifference. App. 43a. Plaintiff's Fourteenth Amendment claim against the San Diego Unified was dismissed on the basis that the San Diego Unified is an arm of the state, immune from suit in federal court. App.37a.

On January 3, 2005, on motions in limine prior to trial, the district court entered its order dismissing the Fourteenth Amendment claims against the individuals on the basis that there was no genuine issue of material fact as to whether the individual defendants' response to the peer harassment was based upon Xavier's disability. App. 15a. The negligence claim was dismissed on the basis that Eleventh Amendment grants immunity to the school district in federal court. App. 11a-12a.

Xavier timely filed his appeal to the Ninth Circuit Court of Appeals on February 3, 2005, which affirmed the district court's orders on March 16, 2007, without review of the Eleventh Amendment issue on the basis that Xavier did not establish that defendants acted with deliberate indifference, both as to the ADA and the Fourteenth Amendment claims. App. 2a-2b.

REASONS FOR GRANTING THE PETITION

This Ninth Circuit Court of Appeals has held that Eleventh Amendment immunity does not apply to public school districts in Alaska, Arizona and Nevada, but for the very same reasons has granted immunity in California.

The Eleventh Amendment will not bar suit against local public entities such as school districts. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 280 (1977). The Ninth Circuit Court of Appeals has ruled, however, that California's school districts enjoy Eleventh Amendment protection.. *Belanger v. Madera Unified School District*, 963 F.2d 248, 251 (9th Cir. 1992).

I. The Ninth Circuit's Holding in *Belanger* Conflicts with its Grant of Immunity to Other States in the Circuit.

The Ninth Circuit Court of Appeals has recently issued decisions in three neighboring states which are *contra* to the *Belanger* decision, finding that Alaska, Arizona and Nevada school districts are not protected from suit in federal court by Eleventh Amendment immunity.

In 2002, Nevada school districts were found to not be instrumentalities of the state, denying Eleventh Amendment protection. *Eason v. Clark County Sch. Dist.*, 303 F.3d. 1137 (9th Circ. 2002). "[t]his Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities even though such entities exercise a 'slice of power'." *Eason v. Clark County Sch. Dist., supra*, 303 F.3d at 1141. The Ninth Circuit Court of Appeals identified the primary criteria for determining whether the school district was a local or state entity, which was "whether a money judgment would be

satisfied out of state funds ..." to find that the Nevada public school district was a local entity and not immune. *Id.*

The *Eason* court noted that "[m]ost courts have held that school districts are not entitled to Eleventh Amendment immunity." *Id.* There the court cited decisions in 14 states which do not provide their school districts with Eleventh Amendment protection including Florida, North Carolina, New Mexico, Utah, Alabama, Pennsylvania, Connecticut, Texas, New York, Louisiana, Illinois, Wyoming, Kansas and Mississippi. *Eason v. Clark County Sch. Dist., supra,* 303 F.3d at 1141, FN2. The Circuit Courts of Appeals which deny immunity include the 2nd Circuit, 3rd Circuit, 4th Circuit, 5th Circuit, 7th Circuit, 10th Circuit, and 11th Circuit. *Id.*

Following *Eason,* in 2003, the Ninth Circuit Court of Appeals held that Alaska's school district was not a state agency entitled to immunity, because it resembled the Nevada school system. *Holz v. Nenana City Public School District*, 347 F.3d 1176, 1181 (9th Cir. 2003).

Again in 2003, the Ninth Circuit Court of Appeals held the public school district in Arizona was not immune under the Eleventh Amendment, using the same analysis in *Eason* and *Holz*, concluding that the local educational agency would bear the burdens, not the state. *Savage v. Glendale Union High School*, 343 F.3d 1036 (9th Cir. 2003).

II. Review Is Warranted to Resolve the Conflict When All Five *Mitchell* Factors Affirm California's School Districts Are Local Entities Not Subject to Immunity.

A five factor test has been adopted by the Ninth Circuit to determine whether an entity is an arm of the state. *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th

Cir. 1988). The *Mitchell* factors include: (1) whether a judgment will affect the state treasury, (2) the corporate status of the entity, (3) whether the entity provides a statewide function, (4) whether the entity can sue and be sued in its own name, and (5) whether the entity has the power to own property. *Mitchell, Id.*

A. The First Factor - Legal Liability for Judgments - Resides With California's Local Educational Entity Under California's Government Code.

The focus of the first *Mitchell* factor - whether a judgment will affect the state treasury - has been changed to, whether the entity is itself legally liable for the monetary judgment. *Regents of the University of California v. Doe,* 519 U.S. 425, 430-31 (1997). Vulnerability of the state's purse remains a guiding principle of Eleventh Amendment determinations. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994).

The State of California is not legally liable for a monetary judgment against a local school district because, under state law, school districts, such as the San Diego Unified, can sue and be sued in their own name, must purchase their own liability insurance and pay their own debts and judgments. In *Johnson v. San Diego Unified School District* (1990), 217 Cal.App.3d 692, 699, the Fourth District Court of Appeal of the State of California affirmed the San Diego Superior Court decision that a California school district is a 'local public entity' with no agency relationship to the State. The *Johnson* court said,

> The separate distinct character of the school district as distinguished from the state educational entities is made clear by the statutory provisions requiring the

> governing board of any school district to purchase liability insurance (Ed. Code [FN3] §35208), to be liable for debts and contracts (§35200), to pay judgments (former §35201) ... to contract with private counsel (§35204) or for legal services (§35205), etc. [FN4].

Johnson, supra, 217 Cal.App.3d at 699.

Further, California's statutes require the school district to pay claims made against them (California Education Code §35202), mandates that they shall provide for their own liability insurance (California Education Code §35208), or be self-insured out of their own funding (California Education Code §35214), and provide rules for reimbursement of personal property (California Education Code §35213). The *Belanger* court did not have before it these definitive statutes for review.

Former California Education Code §35201, repealed in 1980, provided that the school district satisfy any judgments with payment from the school district funds. The Law Revision Commission Comment to California Education Code §35201, identifies this section as superseded by the comprehensive statutes for payment of money judgments against local public entities under California Government Code §§970-971.2. 15 Cal. L. Rev. Comm. Reports 1257 (1980).

The *Johnson* court recognized this and remarked that, by making this change from California's Education Code to California's Government Code to provide for a school district's payment of judgments, "... the Legislature impliedly treated the school district as a 'local public entity' ..." *Johnson, supra,* 217 Cal. App.3d at 700, FN5

The *Johnson* court held, upon reviewing the pertinent statutes, that the California school district is a local public entity under the California Government Tort Claims Act, because claims made against a state agency required payment to be issued by the State Controller, whereas the local school district paid its own judgments. The court said, "It is without dispute here that potential liability rests not with the state, but the school district." *Johnson, Id.*

California's Government Code §§ 970 *et seq.*, outlining the provisions for payment of judgments against local public entities, provides a definition of the local public entity, which excludes the state, and further delineates the time for enforcing judgments (California Government Code §970.1), the manner of payment enforceable by a writ of mandate against the local entity (California Government Code §970.2), payment of interest on the judgment (California Government Code §970.5), payment of court costs on a judgment [California Government Code §971(c)], and investments for judgments (California Government Code §971.2). The *Johnson* court summed it up, by saying, "There is no statute imposing liability on the state for the torts of such separate public entities (Citation)." *Johnson, supra,* 217 Cal. App.3d at 699.

In the case at bar, the district court affirmed that the state does not pay for judgments against California school districts, that the school districts themselves pay their own judgments, but followed the *Belanger* holding as binding precedent in the Ninth Circuit, which found the state "practically" liable for judgments against the school districts because the majority of funding for school programs comes from the state. App. 36a-37a. The district court found that the *Belanger* decision must stand regardless of the state appellate court finding in Johnson. App. 37a. The district court stated that "[]he fact

that the court in *Johnson* found judgments against the school district are not paid by the state controller is not determinative under the first factor in the *Belanger* analysis." App. 37a.

B. The Second Factor - The State's Sovereignty Is Not Disturbed by Judgments Against The Educational Entity

Once it is found that the state is not liable for money judgments against the local educational entity, a review must be made of the effect a lawsuit against the school district might have on the dignity of the state as a sovereign. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996); *Hess v. Port Auth. Trans-Hudson Corp.*, *supra,* 513 U.S. at 40-41. The remaining four *Mitchell* factors address the relationship between the sovereign and the local educational entity.

California's Government Code again, in the California Tort Claims Act, defines a local public entity to specifically exclude the state: "'Local public entity' includes a county, city, district, public authority, public agency, and any other political subdivisions or public corporation in the State, but does not include the State." California Government Code §900.4. *See also, Johnson v. San Diego Unified School District, supra*, 217 Cal. App.3d at 699.

The California legislature has also issued a definition for the state, which provides, as an enumerated requirement for an agency of the state, that claims against the state are paid by the state's Controller: "'State' means the State and any office, officer, department, division, bureau, board, commission or agency of the State claims against which are paid by warrants drawn by the Controller." California Government Code

§900.6. *Johnson v. San Diego Unified School District*, 217 Cal. App.3d at 699.

California's legislature has provided for the school district's status as a political subdivision and local public entity through these definitions provided in California's Government Code, Sections 900.4 and 900.6. *Johnson v. San Diego Unified School District, supra*, 217 Cal. App.3d at 699.

C. The Third Factor - The School District Functions As A Local Public Entity

The *Johnson* court addressed the school district's performance of its duties through the local school board, the means by which it carries out its authority.

> School districts, by statutory provision, act through school boards and the authority of the districts is measured by the authority statutorily conferred upon the boards. (*Gonzales v. State of California* (1972) 29 Cal. App.3d 585, 590 [105 Cal. Rptr. 804]; see *First Interstate Bank v. State of California, supra*, 197 Cal. App.3d [627] at pp. 633-634 [1987].)
>
> The constitutional and derivative statutory scheme governing education in California does not intend to impose upon the state the duty to supervise schoolchildren attending schools operated by school districts, but rather to discharge the broad responsibilities of the state in educating its children through state agencies which are separate and distinct public entities.

Johnson v. San Diego Unified School District, 217 Cal. App.3d at 699. The function, then of the local school districts is to attend to its local responsibilities through the local school board.

D. The Fourth Factor - The Local Educational Entity Can Sue and Be Sued

California has enacted an elaborate method for addressing tort claims made against its governmental entities. California Government Code §§900, *et seq.*, 940, *et seq.* The *Johnson* court discusses the application of California's school districts to California's Government Tort Claims Act:

> Its [the school district's] separate distinct character withstands application of the [Gov. Tort Claims] Act (Gov. Code, §900 et seq.), which governs all claims for money or damages against the school district. ([Educ. Code] §35202).

[Clarification inserted] *Johnson v. San Diego Unified School District, supra,* 217 Cal. App.3d at 699. Further, the *Johnson* court analyzed the duties of California's state agencies, identifying that, although local school districts are agents of the state, they do not represent the state. *Johnson v. San Diego Unified School District, supra,* 217 Cal. App.3d at 698-699.

> "State agencies, even though exercising a portion of the state's powers of government, are not the state or a part of the state [citation]; and may not act on behalf of the state unless authorized to do so by statute [citation]."

Johnson v. San Diego Unified School District, supra, 217 Cal. App.3d at 699.

E. The Fifth Factor - California's School Districts Are Granted The Power to Own Property By California's Education Code

The California Education Code has provided for its local school districts to buy, sell, lease and convey real and personal property in its name.

> The governing board of any school district shall receive in the name of the district conveyances for all property received and purchased by it, and shall make in the name of the district conveyances of all property belonging to the district and sold by it.

California Education Code §17385. Chapter 4 of the California Education Code contains extensive provision for transactions of property held by the local school district. In summary, the *Johnson* court concluded:

> "[T]he fact that a state agency is created by statute to discharge a duty constitutionally imposed on the state does not transmute the agency into 'the state,' nor render the state liable for its acts under a general theory of respondeat superior. [Citations.]" (*First Interstate Bank v. State of California* (1987) 197 Cal. App.3d 627, 633 [243 Cal. Rptr. 8].)

Johnson v. San Diego Superior Court, supra, 217 Cal. App.3d at 699.

Thus, certiorari is warranted to resolve a split within the Ninth Circuit as to the application of Eleventh Amendment

immunity, specifically in California where its own appellate court has found the school districts are local educational entities not immune.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-55195
D.C. No. CV-02-01502-IEG.

[Filed March 16, 2007]

XAVIER GREEN, aka X G,
Plaintiff - Appellant,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT, aka San Diego City Schools;

LEONORA SMITH;

RICHARD THIBODEAU;

JEANINE CUNNINGHAM;

BETH RICHER;

JANICE DAVIS-WINSTON,
Defendants - Appellees.

Appeal from the United States District Court for the Southern District of California.

MEMORANDUM*

Before. **McKAY,**** **KOZINSKI** and **TROTT,** Circuit Judges.

1. Even if we were to revisit *Belaire v. Madera Unified School District*, 963 F.2d 248, 251 (9th Cir. 1992), plaintiff has not established that defendants acted with deliberate indifference. *See Duvall v. County of Kitsap*, 260 F.3d 1124, 1138-39 (9th Cir. 2001) (intentional discrimination—i.e., at least deliberate indifference—is required to recover damages under Title II of the Americans with Disabilities Act); *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 278 Cal. Rptr. 614, 805 P.2d 873, 893 (Cal. 1991) (same for the California Unruh Civil Rights Act). Deliberate indifference requires both knowledge that a protected right is substantially likely to be infringed upon, and a failure to act upon that knowledge. *Duvall*, 260 F.3d at 1139. Here, defendants knew plaintiff had been teased by classmates, and were aware of several unrelated acts of violence on campus. This information did not create a substantial likelihood that plaintiff would be attacked. Nor did plaintiff establish that defendants unreasonably or inadequately responded to plaintiff's reports, or that defendants' actions reflected discrimination against plaintiff based on disability or race—the two bases for protected rights at issue.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Monroe G. McKay, Senior United States Circuit Judge for the Tenth Circuit, sitting by designation.

2. Plaintiff's 42 U.S.C. § 1983 claims against defendants in their individual capacities similarly fail; plaintiff has not established deliberate indifference. *Cf. L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996). Nor could he on this record.

3. The district court properly rejected plaintiff's claim for intentional infliction of emotional distress because defendants' conduct was not extreme and outrageous. *KOVR TV v. Superior Court*, 31 Cal. App. 4th 1023, 1028, 37 Cal. Rptr. 2d 431 (1995), does not eliminate the requirement of extreme and outrageous conduct; it merely reinforces the general rule that the intent to cause emotional distress can be satisfied by showing "reckless disregard."

4. The district court correctly found the vice principal immune from suit under Cal. Gov't Code § 820.2 for her decision to recommend expulsion, because the act "was the result of the exercise of the discretion vested in [her], whether or not such discretion be abused." *Id.*; *see, e.g., Thompson v. Sacramento City Unified Sch. Dist.*, 107 Cal. App. 4th 1352, 1361, 132 Cal. Rptr. 2d 748 (2003) ("A school district's exercise of authority to expel and/or readmit a pupil involves the type of decision that entails the resolution of policy considerations...that compels immunity from judicial reexamination." (internal quotations omitted) (citing cases)).

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-55195
D.C. No. CV-02-01502-IEG.

[Filed March 16, 2007]

XAVIER GREEN, aka X G,
Plaintiff - Appellant,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT, aka San Diego City Schools; et al.
Defendant - Appellees.

JUDGMENT

Appeal from the United States District Court for the Southern District of California (San Diego).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California (San Diego) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 02-CV-1502-IEG (LSP)

[Filed January 4, 2005]

XAVIER GREEN, an individual,
Plaintiff,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT, also known as SAN DIEGO CITY SCHOOLS;

JANICE DAVIS-WINSTON;

RICHARD THIBODEAU;

and

JEANINE CUNNINGHAM,
Defendants.

ORDER (1) GRANTING DEFENDANTS' SIXTH AND SEVENTH MOTIONS IN LIMINE; (2) DENYING ALL OTHER MOTIONS IN LIMINE AS MOOT;

(3) DISMISSING THE CASE IN ITS ENTIRETY; and (4) VACATING THE TRIAL DATE

[Doc. Nos. 76, 77, 77, 78, 79, 80, 81, 82, 84, 85, 86, 87, 88, 89 and 90.]

Presently before the Court are plaintiff's and defendants' motions *in limine*. For the following reasons, the Court grants defendants' sixth and seventh motions *in limine,* denies plaintiff's and defendants' remaining motions *in limine* as moot, dismisses the case in its entirety, and vacates the trial date.

BACKGROUND

A. Factual Background

Plaintiff Xavier Green ("plaintiff"), an African-American male, has attended school in the San Diego Unified School District ("the School District") since he began preschool in 1990. Plaintiff has a physical disability called Erb's Palsy and, as a result, suffers from nerve damage and severely limited use of his left arm. (Plaintiff's Notice of Lodgement, Ex. 2.) Plaintiff attended the School of Creative and Performing Arts ("SCPA") from 1997 through the date this suit was commenced.

During the 2000 to 2001 school year, when plaintiff was 15 years old and in the 9th grade at SCPA, a group of four students began teasing plaintiff. The students, also African-American males, called plaintiff names, including "faggot," "bitch," and "white boy." (Green Depo., 27:2-7.) On March 7, 2001, the four boys who had been teasing plaintiff accosted him at lunch. The boys threw leaves in plaintiff's hair, and pushed him down to the ground. (Green Depo., 36:21-25.)

Plaintiff's suit against the San Diego Unified School District ("School District") and the individual defendants (collectively "defendants") arises out of their response to plaintiff's harassment.[1]

B. Procedural Background

Plaintiff's First Amended Complaint ("FAC") asserted five causes of action against all defendants for: (1) deprivation of equal protection and due process, in violation of 42 U.S.C. § 1983; (2) violation of California Civil Code §§ 51, 51.71 and 54; (3) violation of the Americans with Disabilities Act of 1990 ("the ADA") 42 U.S.C. § 12101, et seq.; (4) failure to supervise students; and (5) intentional infliction of emotional distress. Plaintiff sought general damages, past and future "medical and related expenses," civil penalties, exemplary and punitive damages, and attorneys fees and costs. (FAC, 15.)

On June 22, 2004, the Court granted in part and denied in part defendants' motion for summary judgment. (Doc. No. 67.) The Court denied defendants' motion for summary judgment regarding: (1) plaintiff's negligence claim, and (2) plaintiff's section 1983 claim as to the individual defendants sued in their personal capacities. (Order, 25:18-20.) The Court granted summary judgment for defendants on all other claims. On October 25, 2004, defendants filed motions *in limine* to: (1) exclude plaintiff's negligence claim against the School District and individual defendants based on Eleventh Amendment immunity, and (2) to exclude plaintiff's section

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[1] For a complete factual background of this case, see the Court's June 22, 2004 order ("Order") granting in part and denying in part defendants' motion for summary judgment. (Doc. No. 67)

1983 claim against the individual defendants sued in their personal capacities. (Doc. Nos.89, 90.) The Court now turns to these motions.

DISCUSSION

A. Legal Standard

Summary judgment is proper where "there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material issue of fact is a question that a jury must answer to determine the rights of the parties under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Act Up!/Portland v. Bagley*, 988 F 2d 868, 873 (9th Cir. 1993). A dispute is "genuine" only if "a jury applying [the substantive law's] evidentiary standard could reasonably find for either the plaintiff or the defendant." *Anderson*, 477 U.S. at 255.

In considering a motion for summary judgment, the Court must examine all the evidence in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The moving party bears "the initial responsibility of informing the district court of the basis for its motion." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To satisfy this burden, the moving party must demonstrate that no genuine issue of material fact exists for trial. *Id.* at 322. However, the moving party is not required to negate those portions of the non-moving party's claim on which the non-moving party bears the burden of proof. *Id.* at 323.

Once the moving party demonstrates that there is no genuine issue of material fact, the non-moving party must

designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The facts relied upon must be admissible under the rules governing the admission of evidence generally, including those concerning authentication, relevance, and hearsay. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550-52 (9th Cir. 1990). Conclusory allegations as to ultimate facts are not adequate to defeat summary judgment. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

B. Discussion

1. Negligence Claim

The Eleventh Amendment prohibits federal courts from hearing "any suit in law or equity, commenced or prosecuted against one of the United States..." The Supreme Court has repeatedly held that the Eleventh Amendment bars suits against a state by its own citizens. *See e.g., Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 120,(1984); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Missouri v. Fiske*, 290 U.S. 18, 28 (1933). Further, this prohibition "encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." *Kirchmann v. Lake Elsinore Unified School Dist.*, (2000) 83 Cal. App.4th 1098, 1101; *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997).

The School District and the individual defendants argue that the Court must exclude plaintiff's state law negligence claim at trial because, under the Eleventh Amendment, they are absolutely immune from suit in federal court. In its June 22, 2004 order, the Court found "that the District is an arm of the state for the purposes of Eleventh Amendment

immunity and is therefore immune from liability arising out of plaintiff's § 1983 claim for damages." (Court's June 22, 2004 Order ("Order") at 14:23 to 15:2). This finding is in accord with *Belanger v, Madera Unified School District*, 963 F.2d 248, 250 (9th Cir. 1992). While judgments against school districts are not paid directly by the state controller, the majority of school funding in California comes from the state. Therefore, this Court reasoned, the state is rendered "practically" liable for judgments entered against school districts. *See Belanger*, 963 F.3d at 252; *Kirchmann*, 83 Cal. App. 4th at 1112.

Despite this Court's previous holding, plaintiff argues that school districts may be held liable for negligent supervision of their students in California. Plaintiff is correct to a point; school districts can be sued for negligence in California's state courts. *Hoyem v. Manhattan Beach City Sch. Dist.*, 22 Cal. 3d 508, 513 (Cal. 1978); *M.W. v. Panama Buena Vista Union Sch. Dist.*, 110 Cal. App. 4th 508, 518 (Cal. App. 2003); However, a state's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts. *See e.g. Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Assn.*, 450 U.S. 147, 150 (1981) (per curiam). As the School District has not waived its Eleventh Amendment immunity, neither the School District nor the individual defendants can be held

liable for their alleged negligence in this Court.[2] *Belanger*, 963 F.3d at 254.

Accordingly, the Court grants defendants' sixth motion *in limine*, thereby barring plaintiff from presenting any evidence in support of plaintiff's negligence claim at trial.

2. 42 U.S.C.§ 1983

Section 1983 creates a cause of action against any person who, acting under color of state law, abridges rights created by the Constitution and laws of the United States. Specifically, the statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage ... subjects ... any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...

42 U.S.C. § 1983.

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[2] The Supreme Court has held that a suit against state officers acting in their individual capacities does not violate a state's Eleventh Amendment immunity in certain circumstances where the claimant is seeking only declaratory and injunctive relief. *See Idaho v. Coeur d' Alene Tribe of Idaho*, 521 U.S. 261, 269, 138 L. Ed. 2d 438, 117 S. Ct. 2028 (1997) (citing *Ex parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908)). Since plaintiff seeks monetary damages, and not declaratory or injunctive relief, the individual defendants are entitled to the cloak of Eleventh Amendment immunity as well.

a. Under Color of State Law

In order to pursue a section 1983 cause of action, a plaintiff must establish that the defendant acted under color of state law. *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (section 1983 liability attaches only to those wrongdoers "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it"). In its June 22, 2004 order, the Court held that plaintiff could pursue his section 1983 claim against the individual defendants in their personal capacities. The individual defendants now argue that by proceeding against them in their personal capacities, plaintiff cannot satisfy section 1983's state action requirement. Defendant confuses the capacity in which a defendant is sued with the capacity in which the defendant was acting when the alleged deprivation of rights occurred. The two need not coincide. It is without question that, under section 1983, a plaintiff may sue a state officer in his individual capacity for alleged wrongs committed by the officer in his official capacity. *See Arizonans for Official English v. Ariz.*, 520 U.S. 43, 69 (1997); *see also Blaylock v. Schwinden*, 862 F.2d 1352, 1354 (9th Cir. 1988) (noting that Eleventh Amendment does not prohibit individual capacity suits).

b. Federal Right

To state a claim for relief under 42 U.S.C. § 1983, it is necessary to prove the violation of an underlying right guaranteed by federal law. *Chapman v. Houston*, 441 U.S. 600 (1979). In this case, plaintiff claims that defendants' actions denied him Equal Protection under the Fourteenth Amendment to the Constitution. To state a claim under section 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must show that the

defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class. *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998), *cert. denied*, 525 U.S. 1154 (1999). However, the physically disabled are not a protected class for purposes of equal protection under the Fourteenth Amendment. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985). Therefore, where a defendant's action "does not implicate a fundamental right or a suspect classification [it] passes constitutional muster under the equal protection clause so long as it bears a rational relation to a legitimate state interest." *Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir. 1995). Although this standard is deferential to governmental action, "'the rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary.'" *Id.* (quoting *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990)).

Plaintiff's basis for his section 1983 claim is that the individual defendants failed to prevent other students from harassing him because he is disabled[3] This Court previously

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[3] Plaintiff has previously argued that the State and Federal Safe School Acts and defendants' negligence formed the basis for his section 1983 claim. This Court finds that the State and Federal Safe School Acts do not create a constitutionally protected right. Further, a claim of mere negligence cannot form the basis for a violation of federal rights. *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986). The Court need not decide whether certain breaches of duty that might be characterized as "gross negligence" would be actionable under section 1983, because it is convinced that defendants' conduct alleged here does not cross that threshold. Defendants' alleged failure to adequately respond to his harassment at school constitutes, at most, mere negligence.

held that there was a genuine issue of material fact as to whether defendants' response to plaintiff's harassment was because of his disability. (Order 16:1:13.) However, this Court did not hold that a genuine issue of material fact existed in regards to defendants' unequal treatment of plaintiff. Accordingly, the Court now finds that defendants have established that there is no genuine issue of material fact regarding whether defendants treated plaintiff differently from other students. Further, plaintiff has failed to rebut defendants' showing with "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). Therefore, plaintiff's Equal Protection claim must be denied because he fails to point to facts that establish the most fundamental aspect of an Equal Protection claim: that he was treated differently than a similarly situated person. *Cleburne*, 473 U.S. at 439 (the Equal Protection Clause requires that "'all persons similarly situated...be treated alike.'").

Furthermore, even assuming there was disparate treatment, there is no genuine issue of material fact regarding how the individual defendants responded to plaintiff's harassment. The individual defendants responded to plaintiff's problems in various ways. For example, when plaintiff complained about the harassment to defendant Cunningham during the 2000-2001 school year, Cunningham called plaintiff's mother and referred plaintiff to a school counselor, defendant Thibodeau, (JW Depo., 39:2-18; Cunningham Depo., 16:17-18.) When plaintiff complained about the harassment to defendant Winston, Winston spoke to the boys who had been bothering plaintiff and called the boys' parents. (Winston Depo.; 25:3—26:8-10.) Based on this evidence, the Court, in its June 22, 2004 order, found that defendants were at most negligent in failing to address the peer harassment of plaintiff. (Order 18:14-17.) The Court now finds that the

individual defendants did not act irrationally, and therefore, did not violate plaintiff's rights under the Equal Protection clause.[4]

In sum, plaintiff fails to show any constitutional or federal statutory violation, and therefore, fails to state a claim under section 1983. Therefore, the Court grants defendants' seventh motion *in limine,* thereby barring plaintiff from presenting any evidence in support of his section 1983 claim at trial.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** defendants' sixth and seventh motions *in limine*. Accordingly, plaintiff is barred from presenting evidence on his negligence and section 1983 causes of action. As there are no remaining causes of action to be tried, the Court **DENIES** defendants' and plaintiff's remaining motions *in limine* as **MOOT**, **DISMISSES** the case in its entirety, and **VACATES** the trial date.

IT IS SO ORDERED.

DATED: 1/3/05 /s/
IRMA E. GONZALEZ
United States District Judge

cc: Magistrate Judge Leo S. Papas
All Parties

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[4] Similarly, in the Court's June 22, 2004 order, the Court found that plaintiff failed to establish that the individual defendants acted with deliberate indifference to his rights. (Order 17:14-16.)

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 02-CV-1502-IEG (LSP)

[Filed June 22, 2004]

XG, a minor, by JW, his Guardian ad Litem,
Plaintiff,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT, also known as SAN DIEGO CITY SCHOOLS;

LEONORA SMITH;

JANICE DAVIS-WINSTON;

RICHARD THIBODEAU;

JEANINE CUNNINGHAM;

and

BETH RICHER,
Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION

[Doc. No. 45.]

Presently before the Court is defendants' motion for partial summary judgment or summary adjudication. For the reasons stated below, the Court denies defendants' motion in part and grants it in part.

BACKGROUND

A. Factual Background

XG ("plaintiff"), an African-American male, has attended school in the San Diego Unified School District ("the District") since he began preschool in 1990. Plaintiff has a physical disability called Erb's Palsy and, as a result, suffers from nerve damage and severely limited use of his left arm. (Plaintiff's Notice of Lodgement, Exh. 2.) Plaintiff also suffers from a learning disability. (Plaintiff's Notice of Lodgement, Exh. 3.) In 1990, plaintiff was diagnosed as a special education child and the District developed an Individualized Education Program ("IEP") for him. (Plaintiff's Notice of Lodgement, Exh. 3.) Plaintiff received special education assistance from 1990 to 1992, but then not again until 2001. (Plaintiff's Notice of Lodgement, Exh. 16.)

Plaintiff attended the School of Creative and Performing Arts ("SCPA") from 1997 through the date this suit was commenced. Plaintiff's mother ("JW") discussed her concerns about plaintiff's education with SCPA counselor Janice Davis-Winston ("Winston") twice between 1997 and 2000. (Deposition of JW ("JW Depo."), 81:4—84:4.)

In 1997, plaintiff complained to SCPA nurse Beth Richer ("Richer") that he was experiencing anxiety and fear about new situations, friends, and tests. (Plaintiff's Notice of Lodgement, Exh. 6.) Plaintiff's symptoms included hiccups and hand tremors. (Plaintiff's Notice of Lodgement, Exh. 6.) Nurse Richer sent plaintiff's mother a referral form so that plaintiff could be evaluated "for physiological causes" and receive "follow up counseling as needed." (Plaintiff's Notice of Lodgement, Exh. 6.)

During the 1999 to 2000 school year, plaintiff started playing a trumpet as part of his enrollment in band class. (XG Depo., 106:12—107:2.) Plaintiff's band teacher told plaintiff that he was holding the trumpet the wrong way and that plaintiff should play a different instrument if he was unable to hold a trumpet. (XG Depo., 107:5—108:8). Plaintiff's band teacher was aware of plaintiff's physical disability. (XG Depo., 107:25—108:5.) Despite the statements made by plaintiff's teacher, plaintiff continued to play the trumpet. (XG Depo., 108:9-10.)

During the 2000 to 2001 school year, when plaintiff was 15 years old and in the 9th grade at SCPA, a group of four students began teasing plaintiff. One student threw paper at plaintiff while he was taking a test. (XG Depo., 19:107—20:24.) In addition, the students, also African-American males, called plaintiff names, including "faggot," "bitch," and "white boy." (XG Depo., 27:2-7.)

Plaintiff testified at his deposition that he told SCPA school nurse Janet Cunningham ("Cunningham") about the teasing four or five different times prior to March 7, 2001. (XG Depo., 24:1—26:14.) In response, Cunningham asked plaintiff whether he was okay and recommended that he lay down and rest in the nurses's station. (XG Depo.,

26:14—29:23.) During one of these conversations, plaintiff told Cunningham that he was contemplating suicide because of the boys' teasing. (XG Depo., 32:12—34:22; 117:4—118:11.) Cunningham called plaintiff's mother and informed her that plaintiff had come into the nurses office on several occasions, complaining about students teasing him, and that Cunningham was concerned about plaintiff's statement that he wanted to hurt himself, though Cunningham did not believe he was suicidal. (Deposition of JW ("JW Depo."), 34:2—39:4.) During this phone conversation, Cunningham sought and obtained permission from plaintiff's mother to refer plaintiff to SCPA school counselor Richard Thibodeau ("Thibodeau"). (JW Depo., 39:2-18.) Cunningham subsequently referred plaintiff to Thibodeau for plaintiff's "complaints of sadness." (Deposition of Janet Cunningham ("Cunningham Depo."), 16:17-18.)

Prior to March 7, 2001, plaintiff also informed SCPA counselor Winston about the teasing he was experiencing. (XG Depo., 30:17—32:6.) Winston told plaintiff not to worry about it and that the teasing would go away. (XG Depo., 31:5-7; Deposition of Janice Davis-Winston, ("Winston Depo."), 26:18-22.) After meeting with plaintiff, Winston called each of the students plaintiff had complained about into her office and told them that she did not want to hear another report that the students were saying anything to plaintiff. (Winston Depo., 23:23—24:22.) Winston also called the students' parents and informed them of the complaints about their children's behavior. (Winston Depo., 25:3—26:7). Winston received no further complaints of harassment from plaintiff. (Winston Depo., 26:8-10.)

Plaintiff also spoke to SCPA school counselor Thibodeau about the teasing. Thibodeau asked plaintiff whether he would like Thibodeau to talk to the boys about their behavior,

though plaintiff testified that Thibodeau never spoke with the boys about the matter. (XG Depo., 44:10—45:3.) Prior to March 7, 2001, plaintiff did not speak to any other defendants about the teasing he was experiencing. (XG Depo., 41:1—42:25.)

On March 7, 2001, an incident involving plaintiff and the four students who had been teasing him occurred on campus, during lunch. As plaintiff was walking to get something to eat, the group approached plaintiff and accused him of talking negatively about one of the four. (XG Depo., 36:2-8.) After Plaintiff denied the allegation, one of the students "grabbed leaves from the tree and put them on [plaintiff's] hair." (XG Depo., 36:10-12.) Another student then took plaintiff's keys and wallet out of his hand and passed it around the group until one of the students threw plaintiff's wallet on the floor. (XG Depo., 36:12-19.) When plaintiff bent down to pick up his wallet, one of the students used his crutch and "shove[d] it up [plaintiff's] butt." (XG Depo., 36:18-21.) As plaintiff attempted to stand up, the student hit plaintiff across the back with the crutch. (XG Depo., 36:21-23.) The other students pushed plaintiff and threw more leaves in plaintiff's face and hair. (XG Depo., 36:21-25.) Plaintiff was on the floor, crying, when another student approached and helped plaintiff to a security guard. (XG Depo., 36:25—37:2-3.)

The following day, March 8, 2004, plaintiff brought an Xacto knife to school, with his art teacher's permission. (XG Depo., 45:12-24.) One of the students who had been teasing plaintiff saw plaintiff in the hallway and asked plaintiff why he got two of the other students suspended for the incident that occurred of the previous day. (XG Depo.,45:24—46:10.) As the two were speaking, the Xacto knife, which was in plaintiff's pocket, was poking plaintiff in his leg. (XG Depo., 46:11-13.) Plaintiff removed the knife from his pocket in

order to put it in his backpack. (XG Depo., 46:13-14.) Plaintiff testified that when he took the knife out of his pocket, the student walked towards the knife "to make it seem like [plaintiff was] trying to ... stab him and have a teacher come out and put the blame on [plaintiff]." (XG Depo., 48:17-21.) The student asked plaintiff if plaintiff was going to kill him. (XG Depo., 46:14-15; 60:3-5.) Plaintiff replied: "No, but I'm going to dissect your brains." (XG Depo., 60:6-7.) The student told plaintiff that he would kill plaintiff if plaintiff did that. (XG Depo., 60:7-8.)

Later in the day, the student told SCPA Vice Principal Lenora Smith that plaintiff had tried to stab him in the throat with a knife. (Plaintiff's Notice of Lodgement, Exh. 9.) Smith suspended plaintiff for five days, beginning March 9, 2001. (Plaintiff's Notice of Lodgement, Exh. 9.) Smith also recommended plaintiff for expulsion, which commenced after plaintiff's five day suspension. (Plaintiff's Notice of Lodgement, Exh. 13.) Following a hearing on April 4, 2001, the District's Expulsion Review Panel also recommended plaintiff for expulsion. (Plaintiff's Notice of Lodgement, Exh. 12.) On August 28, 2001, the IEP Manifestation Team determined that plaintiff should not be expelled. (Plaintiff's Notice of Lodgements, Exh. 16.) Plaintiff returned to school at SCPA in September 2001 and did not experience any more teasing from the four students. (XG Depo., 57:5-16.)

Pursuant to the claim filing requirements of California Government Code §§ 900 et seq., Plaintiff filed an application for leave to present a late claim with the District on February 5, 2001, regarding the District's alleged failure to assess plaintiff's special education needs and protect him from physical and emotional abuse. (First Amended Complaint, Exh. A.) On February 25, 2001, the District accepted the late

claim and rejected the claim on its merits. (First Amended Complaint, Exh. B.)

On May 14, 2001, plaintiff and the District signed a "Contingent Final Agreement" regarding plaintiff's special education services. (Plaintiff's Notice of Lodgements, Exh. 15.)

B. Procedural Background

On August 1, 2002, plaintiff, through his mother and guardian *ad litem,* filed a complaint in this Court against the San Diego Unified School District, SCPA Vice Principal Lenora Smith, SCPA Counselor Janice Davis-Winston, SCPA Life Skills teacher Richard Thibodeau, SCPA nurse Janet Cunningham, and former SCPA nurse Beth Richer (collectively "defendants"). (Doc. No. 1.) Plaintiff sued the individual defendants in both their personal and official capacities. (Doc. No. 1.) On August 13, 2002, plaintiff filed a First Amended Complaint ("FAC"). (Doc. No. 6.) Plaintiff's FAC asserts five causes of action against all defendants: 1) deprivation of equal protection and due process, in violation of 42 U.S.C. § 1983; 2) violation of California Civil Code §§ 5 1, 51.7, and 54; 3) violation of the Americans with Disabilities Act of 1990 ("the ADA"), 42 U.S.C. § 12101, et seq.; 4) failure to supervise students; and 5) intentional infliction of emotional distress. Plaintiff seeks general damages, past and future "medical and related expenses," civil penalties, exemplary and punitive damages, and attorneys fees and costs. (FAC, 15.)

On April 1, 2004, defendants filed a motion for summary judgment or, alternatively, for summary adjudication. (Doc. No. 45.) Plaintiff filed an opposition to the motion on April 16, 2004. (Doc. No. 55.) Defendants filed their reply on May

10, 2004. The Court held oral argument on defendants' motion on June 10, 2004.

DISCUSSION

A. Legal Standards

Summary judgment is proper where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material issue of fact is a question that a jury must answer to determine the rights of the parties under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). A dispute is "genuine" only if "a jury applying [the substantive law's] evidentiary standard could reasonably find for either the plaintiff or the defendant." *Anderson*, 477 U.S. at 255.

In considering a motion for summary judgment, the Court must examine all the evidence in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The moving party bears "the initial responsibility of informing the district court of the basis for its motion." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To satisfy this burden, the moving party must demonstrate that no genuine issue of material fact exists for trial. *Id.* at 322. However, the moving party is not required to negate those portions of the non-moving party's claim on which the non-moving party bears the burden of proof. *Id.* at 323.

Once the moving party demonstrates that there is no genuine issue of material fact, the non-moving party must designate "specific facts showing that there is a genuine issue

for trial." *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The facts relied upon must be admissible under the rules governing the admission of evidence generally, including those concerning authentication, relevance, and hearsay. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550-52 (9th Cir. 1990). Conclusory allegations as to ultimate facts are not adequate to defeat summary judgment. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

B. Discussion

1. IDEA Exhaustion Requirement

Defendants contend that they are entitled to summary judgment on "any issues in this case relating to special education services received or not received by the plaintiff" on the grounds that plaintiff has failed to exhaust these claims, as required by the Individuals with Disabilities Education Act ("IDEA"). (Memorandum In Support of Motion for Summary Judgment ("Motion for Summary Judgment") at 16.) For the reasons stated below, the Court agrees that plaintiff is precluded from raising the adequacy of the special education services he received.

The purpose of IDEA is to ensure that children with disabilities are provided free and appropriate public education that incorporates special education services designed to meet the children's needs. *See* 20 U.S.C. § 1400(d). Before an individual may enforce any rights provided under IDEA, he or she must exhaust the administrative remedies set forth in IDEA. *Robb v. Bethel School Dist.*, 308 F.3d 1047, 1049 (9th Cir. 2002). The administrative exhaustion requirement also applies to claims brought under statutes other than IDEA, but which seek relief available under IDEA. *Id.* Moreover, the Ninth Circuit has held that plaintiffs cannot avoid IDEA's

exhaustion requirements merely by suing under another statute and limiting their claims to money damages, a type of relief which is not available under IDEA. *Id.* at 1049-50. Rather, "[t]he dispositive question generally is whether the plaintiff has alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies." *Id.* at 1050. When "IDEA's ability to remedy a particular injury is unclear, exhaustion should be required to give educational agencies an initial opportunity to ascertain and alleviate the alleged problem." *Id.*

In *Witte v. Clark County School District*, 197 F.3d 1271, 1275-76 (9th Cir. 1999), the Ninth Circuit held that a plaintiff's § 1983 and ADA claims could proceed in federal court where: l) all educational issues had been resolved to the parties' satisfaction through the IEP process; 2) the claim for damages was entirely retrospective; and 3) the alleged injury involved physical abuse and injury, not verbal abuse and humiliation. Under those circumstances, the Court determined that the plaintiff's claim for money damages did not seek relief available under IDEA. *Id.*

Unlike *Witte*, the plaintiff in the present case has not limited his request for relief to solely retrospective damages; rather, plaintiff also seeks "future medical and related expenses." In addition, the injuries alleged in plaintiffs' FAC include verbal abuse and humiliation. Moreover, plaintiff's FAC contains numerous allegations that plaintiff received inadequate special education services and was deprived of educational "accommodations, advantages, facilities, privileges and services." (FAC ¶ 10, 11, 15, 25, 35, 36, 46, 47, 49, 63.) In fact, all but plaintiff's fourth cause of action challenge, to some extent, the sufficiency of the special education services that were provided to plaintiff by

defendants. Based on these factors, the Court finds that plaintiff is seeking relief available under IDEA in his FAC.

However, the Court also finds that plaintiff and the District have resolved all issues regarding plaintiff's special education which were raised in plaintiff's FAC. Specifically, plaintiff's mother testified during her deposition that the allegations in the complaint regarding the inadequacy of plaintiff's special education services and defendant's deprivation of educational "accommodations, advantages, facilities, privileges and services" had been resolved. (JW Depo. 111:4--116:13). Plaintiff also submitted a "Contingent Final Agreement," indicating that the parties reached an agreement regarding the school's handling of plaintiff's special education services. (Plaintiff's Notice of Lodgement, Ex. 15.) Based on the above, the Court finds that plaintiff's complaints about the special education services provided by the District have been resolved. Accordingly, there is no triable issue of fact supporting any claim for relief based upon the adequacy of plaintiff's special education services.

Even if plaintiff still seeks relief arising out of plaintiff's special education services, plaintiff is precluded from pursuing these claims at this time because he has not fully exhausted his administrative remedies under IDEA. Plaintiff alleges that he exhausted his remedies "by mediation though the State Education Hearing Office." (Opposition, 25.) However, exhaustion under IDEA requires plaintiffs to undergo a due process hearing and to appeal the outcome of the hearing, if it is unfavorable to the plaintiff. *See* 20 U.S.C. § 1415(l). Here, plaintiff filed a claim under IDEA, but withdrew his request for an expedited due process hearing in the "Contingent Final Agreement" signed by representatives for plaintiff and the District. (Plaintiff's Notice of Lodgment, Ex. 15.) The Contingent Final Agreement specified that

plaintiff and his mother "do not waive their right to file for Due Process Hearing if a dispute arises regarding eligibility, placement, compensatory education, or the manifest determination." (Plaintiff's Notice of Lodgment, Ex. 15.) There is no evidence in the record indicating that plaintiff subsequently requested a due process hearing and plaintiff has made no showing that making such a request would have been futile. Accordingly, the Court finds that plaintiff still has not fully exhausted his administrative remedies under IDEA.

Based on the above, the Court finds that defendants are entitled to summary judgment on all claims which could be remedied under IDEA. The effect of this holding is unclear because although defendants argue that plaintiff failed to exhaust his administrative remedies under IDEA, they fail to specify which of plaintiff's claims they believe are precluded by such failure to exhaust. The manner in which plaintiff's complaint is drafted does not make this determination easy, as plaintiff mentions special education services in reference to all but one of his claims. However, upon closer examination, the special education services plaintiff received appears to be a peripheral issue in plaintiff's complaint. The crux of plaintiff's complaint against defendants appears to be how they responded to the harassment of plaintiff and the events of March 7 and 8, 2004. Thus, the Court holds that defendants are entitled to summary judgement on all claims seeking relief available under IDEA and, that, as a result, plaintiff is precluded from raising the adequacy of plaintiff's special education services in this action.

2. State Immunity

The individual defendants contend that they are immune from liability for all of the claims asserted against them, on the grounds that disciplinary decisions made by school

officials are discretionary acts for which they are immune from liability under California Government Code § 820.2. The District argues that, as a result of the individual defendants' immunity, the District is immune from liability pursuant to § 815.2(b). Plaintiff contends that the decision to expel him was a ministerial or operational act, for which defendants are not immune from liability.

The California Tort Claims Act ("CTCA") sets forth the parameters of public employee and public entity tort law liability. Because the CTCA only governs liability for tort claims, if defendants are immune from liability under §§ 815.2 or 820.2, they are only immune from liability arising out plaintiff's negligent supervision and intentional infliction of emotional distress claims.[1] Moreover, defendants' state law immunity argument is based entirely upon their contention that disciplinary decisions made by school officials are discretionary acts. Accordingly, if defendants succeed on their state law immunity argument, immunity will be limited to plaintiff's claim for intentional infliction of emotional distress, the only tort claim arising out of defendants' disciplinary decisions.[2]

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[1] Immunity under §§ 815.2 and 820.2 does not apply to claims asserted under the Unruh Act. *See Davison ex rel. Sims v, Santa Barbara High Sch. Dist.*, 48 F. Supp. 2d 1225, 1231-33 (C.D. Cal. 1998); *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1390 (N.D. Cal. 1997).

[2] In plaintiff's opposition brief, plaintiff argues that defendants Richer, Winston, Thibodeau, and Cunningham are not entitled to immunity under § 820.2 because their actions regarding plaintiff's special education services, access to the school premises, and right to a violence-free school environment were operational, not discretionary. There are several problems with this argument. First,

The intent of the California legislature in enacting the CTCA was "not to expand the rights of plaintiffs in suits against governmental entities, but to confine potential governmental liability to rigidly delineated circumstances." *Eastburn v. Regional Fire Protection Authority*, 31 Cal 4th 1175, 1183 (Cal. 2003) (citation omitted). To that end, Government Code § 820.2 provides that, "[e]xcept as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." In addition, Government Code § 815.2 provides that, except as otherwise provided by statute, a public entity is not liable for the act or omission of an employee, if that employee is immune from liability.

It is well established that the decision by a school official to discipline a student is a discretionary act that is subject to immunity under § 820.2. *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1390 (N.D. Cal. 1997); *Thompson v. Sacramento City Unified Sch. Dist.*, 107 Cal. App. 4th 1352, 1361 (Cal. App. 2003) ("a school district's exercise of authority to expel ... a pupil involves the type of decision that entails 'the resolution of policy considerations ... that compels

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plaintiff alleges that these acts give rise to violations of the 1st and 14th Amendments, the Federal Safe Schools Act, the State School Safety and Violence Prevention Act, the ADA, and the Unruh Civil Rights Act. None of these alleged violations are based in tort law. Thus, § 820.2 immunity is inapplicable to these alleged violations of the law. Furthermore, plaintiff's FAC does not even include a claim for relief under the Federal Safe Schools Act or the State School Safety and Violence Prevention Act. Finally, as discussed above, plaintiff is precluded from litigating any issues pertaining to his special education services in this lawsuit.

immunity from judicial examination'"); *Skinner v. Vacaville Unified Sch. Dist.*, 37 Cal. App. 4th 31, 39 (Cal. App. 1995) ("the decision to expel entails 'the resolution of policy considerations, entrusted by statute to a coordinate branch of government, that compels immunity from judicial examination'"). In fact, plaintiff can point to no case in which a school district's decision to discipline a student was found to be operational or ministerial, rather than discretionary.

Nonetheless, plaintiff contends that while basic policy decisions are discretionary, "subsequent operational actions in the implementation of that basic decision still must face case-by-case adjudication on the question of negligence." *Barner v. Leeds*, 24 Cal. 4th 676 (Cal. 2000). In *Barner*, the California Supreme Court held that although a public defender's actions involve "difficult choices among complex alternatives and the exercise of professional skill," they "generally do not involve the type of basic policy decisions" within the scope of § 820.2. *Id.* at 691. While case law, including *Barner*, makes it clear that ministerial or operational decisions implementing policy are not within the scope of discretionary immunity under § 820.2, *Barner* did not overrule the established body of case law holding that a school official's decision to expel a student involves the resolution of policy considerations and is therefore discretionary. *See Thompson*, 107 Cal. App. 4th at 1361.

Plaintiff also argues that, even if the decision to expel a student is normally discretionary, Smith failed to make the factual investigation necessary to exercise her discretion. Immunity under § 820.2 requires "a showing that the specific conduct giving rise to the suit involved an actual exercise of discretion, i.e., a [conscious] balancing [of] risks and advantages." *Caldwell v. Montoya*, 10 Cal. 4th 972, 983 (Cal. 1995) (citation omitted). However, it "does not require a

strictly careful, thorough, formal, or correct evaluation," as such a requirement would "swallow an immunity designed to protect against claims of carelessness, malice, bad judgment, or abuse of discretion in the formulation of policy." *Id.* at 983-84. Indeed, the statute itself explicitly provides that public employees are immune from injuries arising out of their discretionary acts, "whether or not such discretion be abased." Cal. Gov. Code § 820.2.

Here, the District's Zero Tolerance Policy requires expulsion of students possessing or brandishing weapons. (Reply, Exh. G.) One could argue that the District's Zero Tolerance Policy imposes such a strict rule that it left no room for Smith to exercise any discretion. In fact, even defendants concede that school administrators are "*required* under District policy to recommend the expulsion of any student brandishing a knife so as to bring that student's case before the Placement and Appeal Panel of individuals who are responsible for dealing with expulsion hearings."[3] (Reply at 9.) However, Smith was still required to make a recommendation as to whether or not plaintiff should be expelled. In determining whether or not to recommend plaintiff for expulsion, Smith had to exercise her discretion regarding whether plaintiff possessed or brandished the Xacto knife and whether the Xacto knife constituted a weapon. Even if, as plaintiff alleges, Smith failed to conduct an adequate factual investigation prior to make her decision, *Caldwell*

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[3] This suggests that, alternatively, Smith could avoid liability arising out of plaintiff's expulsion by establishing that she did not expel plaintiff; rather, she recommended him for expulsion and the District's Placement and Appeal Panel made the discretionary decision to expel plaintiff.

makes it clear that carelessness or abuse of discretion does not preclude the conduct from being immune under § 820.2.

Based on the above, the Court finds that Smith's decision to expel plaintiff was a discretionary act and that Smith is therefore immune from tort liability arising out of plaintiff's suspension under § 820.2, As Smith is immune from liability arising out of plaintiff's expulsion, the District is also immune from liability arising out of Smith's actions under § 815.2(b). Defendants have not made any showing that the remaining individual defendants are immune from liability arising out of plaintiff's claims for intentional infliction of emotional distress or negligent supervision. Accordingly, the Court finds that immunity under §§ 815.2 and 820.2 is limited to that discussed above.

3. Immunity Under the Eleventh Amendment

Defendants contend that the school district and the individual defendants sued in their official capacities are entitled to summary judgment on plaintiff's § 1983 claim on the grounds that they are immune from liability under the Eleventh Amendment.

The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Eleventh Amendment immunity extends to federal suits brought against a state by its own citizens. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). The Eleventh Amendment prohibits actions for damages against state agencies unless Congress expresses a contrary intent.

Belanger v. Madera Unified School District, 963 F.2d 248, 250 (9th Cir. 1992).

a. The District

The issue here is whether the District is an arm of the state for the purposes of Eleventh Amendment immunity. In determining whether an entity is an arm of the state under the Eleventh Amendment, courts consider the following factors: 1) whether a money judgment would be satisfied out of state funds; 2) whether the entity performs central governmental functions; 3) whether the entity may sue or be sued; 4) whether the entity has the power to take property in its own name or only the name of the state; and 5) the corporate status of the entity. *Belanger* 963 F.2d at 250-251 (citing *Mitchell v. Los Angeles Cmtv. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988).

Applying the analysis to a California school district, the *Belanger* court found that: 1) a money judgment against a school district would be satisfied out of state funds because California school districts' budgets are controlled and funded by the state government; 2) California law treats public schooling as a central (statewide) governmental function; 3) California school districts can sue and be sued; 4) California school districts can hold property in their own name, but such property is treated as state property; and 5) California school districts have the corporate status of state agencies. *Belanger*, 963 F.2d at 251-54. "The *Belanger* court balanced the five factors, according the most weight to the first factor and the least weight to the third and fourth factors, and held that California school districts are agents of the state and therefore immune from suit under the Eleventh Amendment. *Id.* at 254. *See also Kirchmann v. Lake Elsinore Unified Sch. Dist.*, 83 Cal. App. 4th 1089, 1115 (Cal. App. 2000) ("[T]he Ninth

Circuit in *Belanger* correctly determined a California school district should be considered an arm of the state for purposes of the Eleventh Amendment.") The *Belanger* court distinguished California from other states, most of which have vested control over school funding in local government, not state government, thus precluding Eleventh Amendment immunity for school districts. *Id.* at 254.

Plaintiff argues that the holding in *Belanger* is flawed because the court erroneously concluded that judgments against California school districts are satisfied out of state funds, the factor which the *Belanger* court found to be the most important. *Id.* at 251. Plaintiff argues that under the relevant California statutes, which plaintiff fails to cite, school districts are required to purchase liability insurance and pay their own debts and judgments. *See Johnson v. San Diego Unified School Dist.*, 217 Cal. App. 3d 692, 699-700) (holding that the school district was a "local public entity," not the "state," under Cal. Gov. Code § 900.4). Plaintiff argues that the Court should follow *Johnson*, which found that potential liability for a personal injury claim "rests not with the state, but with the school district"[4] *Id.* at 700.

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[4] Plaintiff also relies on several Ninth Circuit cases addressing whether school districts in other states qualify as arms of the state under the Eleventh Amendment. *See Savage v. Glendale Union High Sch.*, 343 F.3d 1036 (9th Cir. 2003) (Arizona school district not entitled to Eleventh Amendment immunity); *Holz v. Nenana City Public Sch. Dist.*, 347 F.3d 1176 (9th Cir. 2003) (Alaska school district not entitled to Eleventh Amendment immunity); *Eason v. Clark County Sch. Dist.*, 3030 F.3d 1137 (9th Cir. 2002) (Nevada school district not entitled to Eleventh Amendment immunity), However, even plaintiff acknowledges that these cases recognize the "unique structure of the California school system"

Johnson is distinguishable on several grounds. First, the issue in *Johnson* was whether the school district qualified as a "local public entity" or the "state" under the California Government Code not whether the district was entitled to immunity under the Eleventh Amendment. *See Id.* at Plaintiff fails to show how the analysis for determining whether an entity is a "local public entity" under the California Government Code is the same as the analysis for determining whether an entity is an arm of the state under the Eleventh Amendment. A close reading of *Johnson* reveals that an entity that qualifies as a "local public entity" may, at the same time, be an arm of the state. For example, in *Johnson*, the court recognized that, "[a]lthough a school district constitutes a 'state agency' ... it is a 'local public entity' under the claimfiling requirements of the [California Tort Claims] Act. *Id.* at 699. Thus, the findings of *Johsonson* and *Belanger* are not necessarily inconsistent, as plaintiff suggests.

Moreover, the first factor in the *Belanger* analysis, whether a judgment would be satisfied out of state funds, is not as rigid as plaintiff suggests. Rather, the "most crucial question is ... whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury." *Belanger*, 963 F.3d at 251 (citations omitted). Both *Kirchmann* and *Belanger*, decided after *Johnson*, conclude that in cases involving California school districts, the first factor counsels in favor of Eleventh Amendment immunity. Despite the fact that judgments against school districts are not paid directly by the state controller, the courts found that the majority of school funding in California comes from the state, which renders the

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and therefore do not overrule *Belanger*. *Holz*, 347 F.3d at 1181 (citing *Eason)*.

state "practically" liable for judgments entered against school districts. *See Belanger*, 963 F.3d at 252; *Kirchmann*, 83 Cal. App. 4th at 1112. Thus, the fact that the court in *Johnson* found judgments against the school district are not paid by the state controller is not determinative under the first factor in the *Belanger* analysis.[5]

Based on the discussion set forth above, the Court finds that the District is an arm of the state for the purposes of Eleventh Amendment immunity and is therefore immune from liability arising out of plaintiff's § 1983 claim for damages.

b. Individual Defendants in Their Official Capacity

The Ninth Circuit has held that school officials sued for damages in their official capacity are also entitled to Eleventh Amendment immunity, as claims asserted against district officials are the practical equivalent of claims asserted against the district, which is an arm of the state. *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1100 n.4 (9th Cir. 2000). *See also Goleta Union Dist. v. Ordway*, 166 F. Supp. 2d 1287, 1297 (C.D. Cal. 2001). Accordingly, the Court finds that the individual defendants sued in their official capacities are also entitled to summary judgment on plaintiff's § 1983

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[5] Plaintiff points out that Steven J. Cologne, lead counsel in the present case, also represented the San Diego Unified School District in *Johnson*. Plaintiff argues that the District claims it is a state entity, rather than a local entity, only when it is convenient, and implies that the District may be precluded from arguing that it is an arm of the state in the present case. However, as the Court discussed above, the issues in *Johnson* and the present case are distinct and the Court finds that the District has not taken an inconsistent position on its status.

claim. However, plaintiff may proceed against the individual defendants in their Personal capacities.

4. ADA

In order to succeed on a cause of action under the ADA, a plaintiff must establish that he (1) had a disability, (2) was excluded from participation or denied benefits of a public entity's services, or was otherwise discriminated against, and that (3) the discrimination was because of his disability. *See Weinreich v. Los Angeles County Metropolitan Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997). In order to recover damages under Title II of the ADA, a plaintiff must also establish intentional discrimination or deliberate indifference. *Duvall v. Kitsap County,* 260 F.3d 1124, 1138 (9th Cir. 2001).

Defendants argue that they are entitled to summary judgment on plaintiff's claim under the ADA because there is no evidence that plaintiff was discriminated against because of his physical disability or learning disability and there is no evidence that defendants acted with the requisite state of mind, that of "deliberate indifference."

a. "Because of" Disability

Defendants argue that plaintiff cannot establish that he was discriminated against on the basis of his disability because he admitted in his deposition that none of the SCPA staff members treated him differently based on his learning or physical disability. However, the Court finds that plaintiff has nonetheless raised a genuine issue of material fact on this issue.

It is undisputed that plaintiff testified that he did not feel that any SCPA staff members treated him differently because of his disability. (XG Depo., 68:1-23.) However, other evidence suggests that plaintiff may have been treated differently because of his disabilities. First, plaintiff has provided evidence the peer harassment he experienced was based, in part, on his disabilities. For example, plaintiff established that his physical disability causes his left arm to hang limp and argues that plaintiff's peers called him a "faggot" because of the appearance of his arm. Plaintiff also provided evidence that he had a learning disability and argues that his peers harassed him while he was trying to complete a test due to the fact that he was slower than the other students. Moreover, plaintiff's testimony establishes that he complained about peer harassment to defendants Richer, Winston, Cunningham, and Thibodeau, and that defendants did not stop the harassment.[6] Based on this evidence, the Court finds that there is a genuine issue of material fact regarding whether any of defendants' actions or omissions were because of plaintiff's disabilities.

b. Deliberate Indifference

Monetary damages are only available under Title II of the ADA when the plaintiff can establish intentional discrimination on the part of the defendant:[7] *Duvall*, 260 F.3d

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[6]Plaintiff's testimony establishes that his band teacher discouraged him from playing the trumpet because plaintiff's physical disability prevented him from holding it correctly. However, as the Court explained above, plaintiff is precluded from raising any issues pertaining to the adequacy of plaintiff's special education services.

[7] At oral argument, plaintiff cited *Lentini v. California Center for the Arts, Escondido*, 2004 WL 1171695 (9th Cir. May 27, 2004),

at 1138. The Ninth Circuit has held that this requirement may be satisfied by showing that the defendant acted with deliberate indifference. *Id.* Deliberate indifference requires both (1) knowledge that a harm to a federally protected right is substantially likely, and (2) a failure to act upon that likelihood. *Id.* (citing *City of Canton v. Harris.*, 489 U.S. 378, 389 (1988)). Knowledge is met when a public entity has notice that an accommodation is needed. *Id.* at 1139. Once on notice, a public entity must make a fact-specific investigation to determine what constitutes a reasonable accommodation, and must consider the particular individual's needs. *Id.* Mere speculation that an accommodation is not feasible is insufficient. *Id.* An entity "fails to act" if the failure is a result of conduct that is "more than negligent, and involves an element of deliberateness." *Id.* at 1140. Deliberate indifference is, therefore distinguishable from negligence. *See, e.g., Bryan County Commissioners v. Brown*, 520 U.S. 397, 407 (1997) (noting that in showing deliberate indifference a "showing of simple or even heightened negligence will not suffice"); *Duvall* 260 F.3d at 1140 (finding that a failure to act is not deliberate indifference unless it is a "result of conduct that is more than negligent").

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in support of his argument that he was not required to establish intentional discrimination or deliberate indifference in order to succeed on his ADA claim. *Lentini* does affirm the well established rule that a violation of the ADA also constitutes a violation of the Unruh Act. *Id.* at * 10. However, the ADA claim in *Lentini* was asserted under Title III of the ADA and the *Lentini* court did not overrule the requirement that a plaintiff seeking damages under Title II of the ADA must establish intentional discrimination or deliberate indifference. *Id.* at *4. Plaintiff has not alleged a violation of Title III of the ADA. Accordingly, the Court finds that *Lentini* adds nothing to plaintiff's argument.

Here, plaintiff has failed to allege precisely how he believes defendants violated the ADA. First, if plaintiff's ADA claim is based on the special education services provided by defendants, the Court finds, as discussed above regarding exhaustion under IDEA, that there is no triable issue of fact on this issue. Second, if plaintiff's ADA claim is based on a theory of retaliation, as suggested by plaintiff's cite to 42 U.S.C. § 12203 in his complaint, the Court finds that plaintiff has provided no evidence supporting this theory. (FAC, ¶ 47.) Third, if plaintiff's ADA claim is based on defendants' failure to prevent the peer harassment of plaintiff,[8] the Court finds that plaintiff has failed to establish that defendants acted with deliberate indifference to his rights.[9]

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[8] Though the parties do not raise this issue, some courts have found that an ADA claim based on defendants' failure to stop the peer harassment of a plaintiff can give rise to a cause of action for "hostile learning environment," similar to that for a hostile work environment under Title VII. *See Guckenberger v. Boston Univ.*, 957 F.Supp. 306, 314 (D.Mass.1997); *Gaither v. Barron*, 924 F.Supp. 134, 136-37 (M.D.Ala.1996) (noting that harassment claim under ADA may proceed under Title VII hostile work environment standard, but concluding that plaintiff failed to plead ADA claim in his complaint which raised state tort claim).

[9] Plaintiff also cites to the Federal Safe Schools Act, 20 U.S.C. § 5691, and the State School Safety and Violence Prevention Act, California Education Code § 32228, and provides evidence of twenty one "acts of violence and forms of harassment" (not involving plaintiff) that occurred at SCPA during the year and a half preceding March 7, 2001. (Richer Depo., 21:17-29:10; Smith Depo.,27:5-28:10.; Plaintiff's Notice of Lodgment, Exh. 22.) Plaintiff argues that these reports of violence and harassment demonstrate that the district knew or should have known that "violence, fights, hate crimes and similar acts were not

The evidence demonstrates plaintiff complained to school officials on several occasions about his anxiety in dealing with his peers and peer harassment. However, the evidence also demonstrates that these same school officials took steps to address his complaints. For example, when plaintiff complained to defendant Richer in 1997 about anxiety regarding his peers, Richer called plaintiff's mother and referred plaintiff for physiological and psychological services. (Plaintiff's Notice of Lodgement, Exh. 6.) When plaintiff complained about the harassment to defendant Cunningham during the 2000-2001 school year, Cunningham called plaintiff's mother and referred plaintiff to a school counselor, defendant Thibodeau. (JW Depo., 39:2-18; Cunningham Depo., 16:17-18.) When plaintiff complained about the harassment to defendant Winston, Winston spoke to the boys who had been bothering plaintiff and called the boys' parents. (Winston Depo., 25:3—26:8-10.) Although there is no evidence in the record regarding what action, if any, Thibodeau took in response to plaintiff's complaints, the evidence shows that plaintiff's complaints of harassment were addressed by defendants on numerous occasions and in various manners.

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uncommon." (Opposition at 20.) Plaintiff also argues that this evidence demonstrates that defendants acted deliberated indifference, but does not explain the basis for this contention. To extent that plaintiff is arguing that defendant's failure to comply with the state and federal school safety acts gives rise to a cause of action under the ADA, the court is unpersuaded. These statutes pertain to federal school funding and plaintiff has not established that they create a federal right protected under the ADA. Nor has plaintiff established a nexus between the alleged acts of violence taking place at SCPA and any discrimination against plaintiff on the basis of his disabilities.

Based on the above, the Court finds that, at most, the evidence provided by plaintiff shows that defendants were negligent in failing to address the peer harassment of plaintiff. Negligence, however, does not establish deliberate indifference. Accordingly, the Court finds that defendants are entitled to summary judgment on plaintiff's ADA claim.

5. California Government Code §§ 51 and 51.7

In plaintiff's second cause of action, he alleges that defendants violated California Government Code §§ 51 and 51.7, the Unruh Act and the Ralph Act, respectively.

a. Unruh Act

Plaintiff alleges that defendants violated the Unruh Act by failing to stop the peer harassment of plaintiff, despite their knowledge of the harassment.

The Unruh Act provides that:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Cal. Civ. Code § 51. The California Supreme Court has instructed courts "to interpret the Act's coverage in the broadest sense reasonably possible." *Curran v. Mount Diablo Council of the Boy Scouts*, 17 Cal. 4th 670, 688 (Cal. 1998) (citing *Burks v. Poppy Construction Co.*, 57 Cal. 2d 463, 468 (Cal. 1962).

In almost all circumstances, the Unruh Act prohibits only intentional discrimination. *See Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1175 (Cal. 1991) However, pursuant to § 51(f), a violation of an individual's rights under the ADA "shall also constitute a violation of [the Unruh Act]." Thus, an Unruh Act claim based on an ADA claim not requiring proof of intentional discrimination likewise does not require such proof. *See Presta v. Peninsula Corridor Joint Powers Bd.*, 16 F. Supp. 2d 1134, 1136 (N.D. Cal. 1998) ("[I]f Plaintiff need not demonstrate discriminatory intent to prove a claim under the ADA, she similarly need not show such intent to prevail under the Unruh Act."). However, the ADA claim plaintiff asserts in the present case seeks damages under Title II of the ADA and thus requires proof of intentional discrimination or deliberate indifference. *See Duvall*, 260 F.3d at 1 138. Moreover, as discussed above, defendants are entitled to summary judgment on plaintiff's ADA claim.

Defendants argue that they are entitled to summary judgment on plaintiff's claim under § 51 on the grounds that "verbal teasing" is an insufficient basis for an Unruh Act claim. However, unlike § 51.7, a plaintiff does not need to *establish violence or a threat of violence in order to establish a violation of § 51. *See* Cal. Civil Code § 51.

Defendants also argue that plaintiff has alleged insufficient facts to demonstrate that plaintiff's peers teased him because of his race or disability. As discussed above, regarding plaintiff's ADA claim, the Court finds that plaintiff has established a genuine issue of material fact regarding whether the harassment he experienced was due to his disabilities. Plaintiff, an African-American also argues that the boys called him "white boy" as a form of reverse discrimination. Based on the above, the Court finds that there is a genuine issue of

material fact regarding whether plaintiff experienced peer harassment based on his disability or race.

Defendants contend that they are entitled to summary judgment on plaintiff's Unruh Act claim because, even if the other students harassed plaintiff based on his race or disability, there is no evidence of intentional discrimination on defendants' part; that is, no evidence that defendants failed, because of plaintiff's disability or race, to address the harassment. In order to succeed on a claim under the Unruh Act, plaintiff must establish intentional discrimination or a violation of the ADA. However, a school district's inadequate response to a student's complaints of peer harassment satisfies the intentional discrimination requirement and constitutes a denial of advantages, facilities, privileges, or services." *See Davison v Santa Barbara High Sch. Dist.*, 48 F. Supp. 2d 1225, 1232 (C.D. Cal. 1998); *Nicole M.*, 964 F. Supp. at 1389. Accordingly, in order to establish a claim under the Unruh Act, plaintiff need only establish that he experienced peer harassment based on his disability or race, and that defendants failed to take reasonable steps to respond to his complaints about such harassment.

As plaintiff is not required to demonstrate that defendants themselves discriminated against plaintiff due to his race or disability; defendants are not entitled to summary judgment on this basis. However, plaintiff must still establish that defendants failed to take "prompt remedial action to end the harassment." *Nicole M.* at 1389. Plaintiff has established that he complained to school officials on several occasions about anxiety dealing with his peers and peer harassment. However, as discussed above regarding plaintiff's ADA claim, plaintiff has failed to establish that defendants acted with deliberate indifference or otherwise failed to take prompt action to

address the harassment. Accordingly, the Court finds that defendants are entitled to summary judgment on this claim.

b. Ralph Act

Plaintiff's second cause of action also alleges that defendants violated the Ralph Act. The Ralph Act, provides that:

> All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race ... [or] disability ... or because another person perceives them to have one or more of those characteristics.

Cal. Civil Code § 51.7. Section 51.7 does not require that the violence be extreme or motivated by hate and there is "no requirement that the act constitute a crime." *Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1289 (9th Cir. 2001).

In order to determine whether an action violates, § 51.7, courts ask, "would a reasonable person, standing in the shoes of the plaintiff, have been intimidated by the actions of the defendant and have perceived a threat of violent?" *Id.* The plaintiff must also establish that the defendant acted because of plaintiff's membership in one of the protected classes, not because of the conduct of the individual or for some other reason. *See* Cal. Civ. Code § 51.7.

As explained above, the Court finds that there is a genuine issue of material fact as to whether the teasing plaintiff endured was because of plaintiff's race. However, plaintiff

has cited no authority indicating that defendants can be held liable under § 51.7 for threats of violence made by plaintiff's peers. No court has addressed the issue of a school district's liability under § 51.7 for threats of violence made by its students. However several courts have found that companies and their supervisors can be held liable under § 51.7 for employees' threats of violence, based on the theory of *respondeat superior*. *See Winarto*, 274 F.3d 1276; *Beliveau v. Caras*, 873 F. Supp. 1393 (C. D. Cal. 1995). Nonetheless, there is no authority supporting the application of the *respondeat superior* theory of liability to a school district and its students. Such a great expansion of the law would hold schools liable for all threats of violence made by students on schoolyards, whether or not the school authorities were even aware of the threats. This expansion of the law would greatly increase the potential liability of school districts and run counter to the intent of the California Tort Claims Act.

Based on the above discussion, the Court finds that the district cannot be held liable for the acts of plaintiff's peers under § 51.7. Plaintiff has not established that any of the defendants themselves violated § 51.7 by making threats of violence towards plaintiff based on his race or disability. Accordingly, the Court finds that all defendants are entitled to summary judgment on plaintiff's claim under § 51.7.

6. Failure to Supervise

Defendants argue that they are entitled to summary judgment on plaintiff's cause of action for failure to supervise on the grounds that there is no private right of action under California Education Code §§ 200, 201,220, and 44807. Plaintiff contends that this cause of action is a common law negligence claim "which allows for *per se* statutory proof." (Opposition, 22.)

The Court agrees that there is no private right of action under the provisions of the California Education Code cited by plaintiff in his FAC: §§ 200, 201, 220, and 44807.[10] *See Nicole M.*, 964 F.Supp. at 1390. However, California courts have long recognized that school districts may be held liable for the negligent supervision of their students. *See e.g., Hoyem v. Manhattan Beach City Sch. Dist.*, 22 Cal. 3d 508, 513 (Cal. 1978); *Dailey v. Los Angeles Unified Sch. Dist.*, 2 Cal.3d 741, 747-748 (Cal. 1970); *M.W.v. Panama Buena Vista Union Sch. Dist.*, 110 Cal. App. 4th 508, 518 (Cal. App. 2003); *Rodriguez v. Inglewood Unified Sch. Dist.*, 186 Cal. App. 3d 707, 720-21 (Cal. App. 1986).

There are two ways a public entity may be held liable for an injury; either directly or vicariously. Section 815.6 of the California Tort Claims Act provides that:

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

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[10]As the court explained in *Nicole M.*, it is well established under California law that a private right of action may only be inferred if the court determines it is necessary to ensure the effectiveness of the statute. *Nicole M.* 964 F.Supp. at 1390. In *Nicole M.* the court refused to infer a private right of action under California Education Code §§ 200 and 220 because plaintiff had a private right of action under other statutes, including § 1983 and the Unruh Act. *Id. See also Sutta v. Acalanes Union High Sch. Dist.*, 2001 WL 1720616 (N.D. Cal.2001).

In the past, Education Code § 44807 has been found to impose a such a mandatory duty on school districts and to be a sufficient statutory basis for a negligent supervision claim asserted directly against a school,[11] *See Rodriguez*, 186 Cal. App. 3d at 720-21 ("Education Code section 44807 ... is an example of such a mandatory duty."). However, in *Hoff v. Vacaville Unified Sch. Dist.*, 19 Cal. 4th 925, 939 (Cal. 1998), the California Supreme Court held that, "[b]y its terms, Education Code section 44807 requires only 'teacher[s]' to hold pupils to a strict account for their conduct; it does not purport to impose a mandatory duty more broadly on any public entity." The Court finds that, under *Hoff*, plaintiff cannot state a cause of action for negligent supervision directly against the District.

However, the duty imposed by § 44807 is sufficient to hold a school district vicariously liable for injuries to students proximately caused by the negligent supervision of school authorities. *See* Cal. Gov. Code § 815.2; *Hoff*, 19 Cal. 4th at 938 (holding that although school districts can be held vicariously liable for negligent supervision based on § 44807, they cannot be held liable for injuries to non-students occurring off school property); *Dailey*, 2 Cal. 3d at 747; *M.W.*, 110 Cal. App. 4th at 679 (citing § 44807, the court held that the school district was "liable for injuries which result from a failure of its officers and employees to use ordinary care in this respect"). Nonetheless, plaintiff has not

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[11] If Section 44807 provides that, "[e]very teacher in the public schools shall hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess."

established the negligence *per se* doctrine applies to his cause of action for failure to supervise based on § 44807.[12]

Here, plaintiff's cause of action for "failure to supervise" refers to both § 44807 and defendants' alleged negligence in supervising students at SCPA. (FAC, ¶ 56, 58.) The Court finds that this is sufficient to allege a cause of action for negligent supervision and the Court construes plaintiff's claim for "failure to supervise" as a cause of action for negligent supervision. However, the Court finds that § 44807 does not give rise to a cause of action for negligence *per se*. Accordingly, plaintiff must establish that defendants' conduct was negligent. The Court finds that there is a genuine issue of material fact as to whether defendants were negligent in their supervision of plaintiff and his peers and therefore denies defendants' motion for summary judgment on this issue.

7. Intentional Infliction of Emotional Distress

Defendants contend that they are entitled to summary judgment on plaintiff's cause of action for intentional infliction of emotional distress on the grounds that plaintiff has not presented any evidence of "intentional" or "extreme and outrageous" conduct.

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[12] Under the doctrine of negligence *per se*, a presumption of negligence may arise from the violation of a statute which specifies what constitutes due care under the applicable circumstances. 6 Witkin, Summary of Cal. Law, Torts § 818 (2003). Statutes setting forth rules regarding driving and parking motor vehicles are the most common types statutes to which the negligence *per se* doctrine applies. *Id*. Plaintiff has made no showing that the doctrine is applicable to §44807.

In order to succeed on a cause of action for intentional infliction of emotional distress, the plaintiff must establish: 1) extreme and outrageous conduct by the defendant; 2) the defendant's intention of causing, or reckless disregard of the probability of causing, emotional distress; 3) severe or extreme emotional distress; and 4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1001 (Cal. 1993).

Plaintiff correctly argues that a malicious or evil minded purpose is not required to succeed on a claim for intentional infliction of emotional distress. *See KOVR-TV v. Superior Court*, 31 Cal. App. 4th 1023, 1031 (Cal. App. 1995). However, plaintiff must still establish that defendants intentionally caused his emotional distress, or acted with reckless disregard of the probability of that their actions would cause plaintiff's emotional distress. *Potter*. 6 Cal, 4th at 1001.

Plaintiff does not cite any evidence demonstrating that defendants' conduct was intentional or was with reckless disregard for the probable consequences. However, plaintiff implies that a showing of "deliberate indifference" regarding an ADA claim is sufficient to survive a motion for summary judgment on this issue. (Opposition at 24.) As discussed above, regarding plaintiff's ADA claim, plaintiff has also failed to raise a triable issue of fact regarding defendant's alleged deliberate indifference. Accordingly, plaintiff has made no showing that defendant's conduct was intentional or with a reckless disregard for the probable consequences and the Court finds that defendants are therefore entitled to summary judgment on plaintiff's claim for intentional infliction of emotional distress.

8. Summary Judgment for Richer and Smith on All Claims

Defendants argue that Richer and Smith are entitled to summary judgment on all claims asserted against them because plaintiff and his mother both testified that they have no complaints against these individuals.

a. Richer

Plaintiff's mother testified as follows:

> Q: So your communication with Ms. Richer when she was employed at SCPA involved, for instance, this form that she sent you and her recommendation that maybe you might want to sent [plaintiff] to a psychologist and things like that. I understand that was your communications with her, but do you have any complaints about something she did wrong?
>
> A: No.
>
> Q: You're not aware of Ms. Richer having any knowledge of the fact that Xavier was being teased or harassed by any of the boys, correct.?
>
> A: I have no knowledge of that, no. I don't have any knowledge of her knowing that student.
>
> Q: So you don't have any complaints about the fact that she didn't tell anybody because, as far as you're aware, she didn't know?
>
> A: Correct.

(JW Depo., 78:23—79:16.)

Plaintiff argues that even if Richer was not aware of the peer harassment plaintiff experienced during the 2000 to 2001 school year, plaintiff did inform Richer, in 1997, that he was experiencing anxiety dealing with his peers. Plaintiff argues that the Federal Safe Schools Act and the State School Safety and Violence Prevention Act both set forth steps that Richer was required to take in response to plaintiff's complaint. Plaintiff admits that Richer advised plaintiff's mother to have plaintiff evaluated for physiological causes for his anxiety and to seek counseling, but argues that this fails short of Richer's statutory duties.

First, plaintiff has not brought claims under the Federal Safe Schools Act or the State School Safety and Violence Prevention Act.[13] Second, even if Richer failed to follow up on her advice to plaintiff's mother that plaintiff's mother have plaintiff evaluated and see a counselor, plaintiff has made no showing that such a failure subjects Richer to liability under any of plaintiff's claims. Thus, the Court finds that Richer is entitled to summary judgment on all claims asserted against her.

b. Smith

Plaintiff's only complaint regarding Smith is that she failed to investigate the facts before suspending plaintiff and recommending him for expulsion.[14] (Opposition at 4, 24.) As

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[13] Moreover, the State School Safety and Violence Prevention Act, California Education Code § 32228, was not enacted until 1999, two years after Richer's contact with plaintiff.

[14] Plaintiff's FAC alleges that plaintiff's mother informed Smith, prior to March 7, 2001, that plaintiff needed special education services, and that Smith failed to take appropriate action. (FAC

discussed above, the Court finds that Smith is immune from liability arising out other decision to recommend plaintiff for expulsion. *See* Cal. Gov. Code § 820.2. Thus, Smith is immune from liability arising out of the only act of hers which plaintiff takes issue with. On that basis, the Court finds that there is no triable issue of fact regarding Smith's liability and that Smith is therefore entitled to summary judgment on all claims asserted against her.

CONCLUSION

The Court **DENIES** defendants' motion for summary judgment regarding: 1) plaintiff's claim for failure to supervise; and 2) plaintiff's § 1983 claim as to the individual defendants sued in their individual capacities. The Court **GRANTS** summary judgment in favor of: 1) the District and the individual defendants, as sued in their official capacities, on plaintiff's § 1983 claim; 2) all defendants on plaintiff's ADA claim; 3) all defendants on plaintiff's Unruh Act and Ralph Act claims; 4) all defendants on plaintiff's claim for intentional infliction of emotional distress; and 5) Richer and Smith on all claims. Finally, the Court finds that plaintiff is precluded from raising any issues regarding the adequacy of his special education services.

IT IS SO ORDERED.

¶ 11.) However, plaintiff presented no evidence supporting this allegation. Rather, plaintiff's mother testified that she did not "have any complaints or anything with [Smith]." (JW. Depo:, 79:22-23.) Moreover, as discussed above, plaintiff is precluded from raising the adequacy of his special education services.

DATED: June 22, 2004 /s/
IRMA E. GONZALEZ, Judge
United States District Court

cc: Magistrate Judge Leo S. Papas
All Parties